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Comments on [Israeli] Proposal for Structuring Judicial Discretion in Sentencing

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COMMENTS ON PROPOSAL FOR STRUCTURING JUDICIAL DISCRETION IN SENTENCING

Paul H. Robinson*

פרופ׳ פול רובינסון, אחד מחוקרי המשפט הפלילי החשובים בארצות הברית ומחוצה לה, נענה להזמנתנו להתייחס להצעת חוק העונשין (תיקון מס׳ 92) (הבניית שיקול הדעת השיפוטי בענישה), התשס״ו–2006 ולהעיר הערותיו בעניינה. פרופ׳ רובינסון מוצא את ההצעה, בעיקרון, כהולכת בכיוון הנכון, בעיקר בכל הנוגע להסתמכותה על הגמול כעיקרון המנחה לענישה, להסתמכותה על עונשי מוצא אשר יותאמו למקרים ספציפיים בהתייחס לרשימת נסיבות מקלות ומחמירות ולהצעתה למנות ועדת מומחים לקביעת עונשי מוצא.

In this essay, Professor Robinson supports the current proposal for structuring judicial discretion in sentencing, in particular its reliance upon desert as the guiding principle for the distribution of punishment, its reliance upon benchmarks, or "starting-points," to be adjusted in individual cases by reference to articulated mitigating and aggravating circumstances, and the proposal's suggestion to use an expert committee to draft the original guidelines.

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I support the current proposal for structuring judicial discretion in sentencing,[1] in particular its reliance upon desert as the principle for guiding the distribution of punishment,[2] its reliance upon benchmarks, or "starting points," to be adjusted in individual cases by reference to articulated mitigating and aggravating circumstances, and its use of an expert committee to draft the original guidelines.

A. Desert as the Distributive Principle for Punishment

Most American criminal codes are based upon the American Law Institute's Model Penal Code. For the first time in the forty-eight years since its promulgation in 1962, the Model Code has been amended: desert has been adopted as the primary principle for determining sentences.[3] This is a dramatic shift from the previous draft's enthusiastic commitment to the traditional utilitarian distributive principles of deterrence, incapacitation, and rehabilitation.[4]

The turnabout comes not only from the virtues of a criminal sentencing system that imposes just sentences – that is, a sentence based upon the offender's moral blameworthiness, no more and no less – but also from a growing recognition of the weaknesses and limitations of the traditional mechanisms of coercive crime control.

As for deterrence as a distributive principle, a deterrent effect already inherent in a just sentence, and a distribution of punishment designed to provide greater deterrence can do so only by deviating from a just sentence – that is, by either doing injustice (giving more punishment than is deserved) or by failing to do justice

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1 Proposal for Penal Law (Amendment No. 92) (Structuring Judicial Discretion in Sentencing), 5756-2006, Governmental H.H. 446 (hereinafter: The Proposal). English translation at Miriam Gur-Arye et al., *Position Paper on the Proposal for Penal Law (Amendment 92 – Structuring Judicial Discretion in Sentencing), 5756-2006*, 18 (Daniel Ohana trans., 2006); Daniel Ohana, *Sentencing Reform in Israel: The Goldberg Committee Report*, 32 ISR. L. REV. 591, 625-643 (1998).

2 The desert as a distributive principle for punishment was offered in clause 40(b) of the Proposal.

3 Model Penal Code § 1.02 (Amendment adopted May 16, 2007).

4 *Cf*. Model Penal Code § 1.02 (Official Draft, 1962).

(giving less punishment than is deserved). And even if one were to suffer these deviations from justice, current evidence suggest that while deterrence may work under the right conditions, these conditions may be the exception rather than the rule.[5]

As for rehabilitation, while it may be an ideal correctional policy – we ought to try to rehabilitate every offender, for their sake and ours – it does not follow that rehabilitation is a good principle for determining the distribution of criminal liability and punishment. As with deterrence, a just distribution of punishment – according to the offender's blameworthiness, no more and no less – provides an opportunity to rehabilitate, which ought to be eagerly seized. But to have the needs of rehabilitation determine the sentence virtually assures injustice and failures of justice (If that were the case, career criminals deemed to be without rehabilitative hope might go unpunished). Suffering this injustice is a particularly bad trade-off given that rehabilitation is effective only occasionally and, even then, commonly generates only modest crime-control effects.[6]

In contrast to deterrence and rehabilitation, incapacitation of the dangerous individual does clearly work. Imprisoning dangerous persons prevents victimization, at least against victims outside the prison. However, such preventive detention can generally be achieved more fairly and effectively, and with fewer detrimental effects on detainees and the society, when done through a civil preventive detention mechanism outside of the criminal justice system that does not pretend to be in the business of punishing for past offenses.[7]

If the justification for the detention is fear of a possible future offense rather than punishment for a past offense, then the criterion for detention ought to be strictly

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5 See PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? ch. 3 §§ A&B, ch. 4 § B (2008) (hereinafter: ROBINSON, DISTRIBUTIVE PRINCIPLES); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003).

6 See ROBINSON, DISTRIBUTIVE PRINCIPLES, supra note 5, at ch. 5.

7 Ibid, at ch. 6 § D; Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).

future dangerousness. Detention ought to be continually re-justified by a showing of continual dangerousness. Detainees ought to have a right to treatment, and detention conditions should be non-punitive. The reliability of the prediction of dangerousness and the seriousness of the predicted offense ought to meet certain defined minimum levels.

Such a system would be dramatically different from the existing criminal justice system which, by own its terms, presents itself as doing justice for past crimes. If it remains a system of "criminal justice" for past offenses, it will necessarily do a poor job at preventive detention, resulting in both unfairness to detainees and ineffectiveness in protecting society. A desert distribution of punishment provides some incapacitating effect. If the control already inherent in a just sentence proves insufficient for protecting society in an individual case, then detention past the term of just punishment ought to permitted only if it can be openly justified on purely preventive detention grounds.

The turn to desert may also reflect a growing recognition that doing justice is an attractive distributive principle not only because it does justice, with the associated deontological virtues, but also because by gaining a reputation for doing justice in the eyes of the community, the system enhances its instrumentalist crime-control potential. As I have argued elsewhere,[8] earning a reputation for doing justice increases the law's moral credibility and thereby harnesses crime-control powers of social and normative influence. Deviating from desert undermines the criminal justice system's moral credibility and thereby undermines its crime-control effectiveness. Specifically, it undermines its power of stigmatization; increases the chances of vigilantism; promotes resistance and subversion rather than the cooperation and acquiescence that the criminal justice system requires; undermines compliance in borderline cases where the condemnatory nature of the offense may

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8 See, e.g. ROBINSON, DISTRIBUTIVE PRINCIPLES, supra note 5, at ch. 8 and 12; Paul H. Robinson & John Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007); Paul H. Robinson & John Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Paul H. Robinson, Geoffrey P. Goodwin & Michael Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010).

be ambiguous; and reduces the criminal justice system's influence in the public discourse, which forms societal norms.[9]

Of course, the community's view of justice – "empirical desert," as it has been called – is not the same as true desert in a transcendent sense or, as moral philosophers might prefer, "deontological desert." However, given the practical problems with activating deontological desert, empirical desert may be the best approximation that retributivists can hope to achieve. More importantly, many if not most modern moral philosophers appear to believe that there is little meaningful difference between the two.[10] While one may conclude that desert should be the primary principle for distributing punishment, it does not follow that there never ought to be an exception to the principle. The new Model Penal Code "purposes" section does indeed enshrine desert as the first principle, never to be violated. However, my own view is that there may be justifications for deviating from desert, within limits. Doing justice is an important interest, but it is not the only interest

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B. Deviations from Desert

The Proposal expressly authorizes deviations from desert to promote rehabilitation or to protect public safety.[11] Elsewhere I consider a range of other

9 It is also suggested that such deviation might undermine the main purpose of the bill – diminution of the punishing gaps in courts. See in this edition: The Jerusalem Criminal Justice Group, *Position Paper on the Proposal for Penal Law (Amendment no. 92) (Structuring Judicial Discretion in Sentencing), 2006*, 3 HUKIM 19 (2011).

10 Compare in this edition: Leslie Sebba, *Sentencing Scales in Search of a Principle*, 3 HUKIM 99 (2011).

11 Ohana, supra note 1, at 625-26 (§ 3). According to clause 40(G) of the Proposal, the court might also consider other circumstances as justifying deviation from desert.

justifications for deviation,[12] but let me focus here on these two deviations supported by the Proposal. As a start, consider what desert does and does not require. Some things that are authorized as deviations from desert may not be deviations at all, and therefore ought not to require special authorization under a properly construed desert principle.

1. Method of Punishment

The core of desert is to make sure that offenders with higher blameworthiness are punished more than less blameworthy offenders.[13] The focus is on the *quantity* of punishment – primarily getting the relative relation among different cases right – rather than upon the *quality* of punishment. This means that, as long as judges are given guidance as to the amount of punishment to be imposed – the amount that will put the offender at hand in his proper ordinal rank in relation to other offenders of higher or lower blameworthiness – then judges can be given a good deal of discretion in determining the method by which that deserved amount of punishment is imposed, assuming they are similarly instructed as to the respective punitive values assigned to different punishment methods.[14]

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12 For a fuller discussion of justified deviations from desert, see ROBINSON, DISTRIBUTIVE PRINCIPLES, supra note 4, at 249-253.

13 Regarding the evolution of theories in creating ladders of blameworthiness see in details in this edition: Sebba, supra note 11; Ladders of blameworthiness compel creating ladders of punishments. That might seem problematic while determining the severity of punishment methods which are not imprisonment. See in this edition: The Jerusalem Criminal Justice Group, supra note 9.

14 For a general discussion, see PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 213 (2005); Paul H. Robinson, *Desert, Crime Control, Disparity, and Units of Punishment, in* PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN CRIMINAL JUSTICE 93 (A. Duff et al. eds., 1994). Researchers have offered examples of such punitive-effect equivalency tables. See, e.g. Robert E. Harlow, John M. Darley & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71 (1995); Maynard L. Erickson & Jack P. Gibbs, *On the Perceived Severity of Legal Penalties*, 70 J. CRIM. L. & CRIMINOLOGY 102 (1979); Leslie Sebba, *Some Explorations in the Scaling of*

2. Rehabilitation

Fully understanding the demands of desert is also important when considering whether rehabilitation should be an authorized ground for deviating from desert. My guess is that many, if not most people support a deviation from desert for rehabilitation because they think it important to make available rehabilitation programs such as drug treatment, education, and psychological counseling. As noted above, however, a desert distributive principle in no way limits the use of such programs. What it does say is that, after taking account of the intrusiveness, restrictions, emotional and physical challenges, and other demands on the program participants, the total "punitive bite" of the program ought to be the amount the offender deserves – no more and no less. If participating in the rehabilitation program produces less suffering than the punishment the offender deserves, than additional punishment ought to be imposed in some other way, by some additional punishment.

While rehabilitation programs commonly have limited success, and even then only with limited kinds of offenders, some programs can indeed be effective in reducing the chances of recidivism.[15] Perhaps more importantly, many of these programs are valuable for reasons other than crime control – such as in giving offenders a greater chance of living up to their own human potential. That is, rehabilitation can be an important value in itself, even if its crime-control benefits are limited. For all of these reasons, rehabilitation ought to be a fundamental correctional policy. Whenever the correctional system has an opportunity to do so, it ought to provide the possibility of rehabilitation to offenders.

When it works, rehabilitation has value. However, it is important to distinguish between the different roles rehabilitation can assume. Rehabilitation as a core correctional policy is quite different from rehabilitation as a distributive principle for punishment. We may well want to take every opportunity in the correctional system to rehabilitate, but we may not want to determine the amount of punishment to be

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Penalties, 15 J. RES. IN CRIME & DELINQUENCY 247 (1978); Leslie Sebba & Gad Nathan, *Further Exploration in the Scaling of Penalties*, 22 BRITISH J. CRIMINOLOGY 221 (1984).

15 See ROBINSON, DISTRIBUTIVE PRINCIPLES, supra note 5, at 102, 104-106.

imposed based upon the possibility of rehabilitation. If a program exists that will benefit an offender, then he ought to participate in it. But it does not logically follow that that program ought to become the sole punishment for his offense. Such a principle – tying the length of imprisonment, for example, to the length of the rehabilitation program –disconnects punishment from moral blameworthiness so as to make the system seriously conflict with desert with no apparent gain.

One last note regarding rehabilitation is in order. To the extent that people believe that a deviation from desert for rehabilitation is required in order to authorize lesser punishment for first-time, young offenders, I suggest that the concern is misguided and the exception unnecessary. If properly applied, desert as a distributive principle fully accounts for all matters that shape an offender's moral blameworthiness, and therefore ought to take account of the youthfulness of an offender (and the lack of a prior criminal record – see below). That is, a distributive desert principle by itself would demand a lesser punishment for a youthful offender if, for example, his age suggests an as yet undeveloped or underdeveloped appreciation of societal norms and one's obligation to follow them, an incapacity or as yet undeveloped capacity to control impulsiveness, or some other mitigating circumstance. Peoples' intuitions that youthful offenders ought to receive less punishment *are a reflection of desert rather than a deviation from it*. Authorizing still further mitigation – even below the lower punishment than this desert-based mitigation would provide – would undermine the criminal law's moral credibility, and would thereby impair the mechanisms of crime control through normative influence, as described above. The point is not that rehabilitation is somehow part of desert; it is most certainly not. Rather, the point is that, if a judge conscientiously assesses the blameworthiness of a youthful offender, the amount of punishment deserved may be considerably lower than the amount that would be deserved by an adult committing the same offense. And this conclusion follows without any reference whatever to a need for or the potential for rehabilitation. My own view is that rehabilitation ought to be pursued at every opportunity, but only within the confines of the deserved punishment, no more, no less.

3. Incapacitation of the Dangerous

I am also sympathetic to the importance of protecting public safety – the other ground for deviating from desert contained in the Proposal. Again, however, it is not

clear to me that the best means of protecting public safety is to invite deviations from desert in setting criminal sentences. A sentence based upon deserved punishment can provide a significant opportunity to control and monitor an offender's future conduct, thereby providing incapacitation if it is thought to be needed. Indeed, without deviating from desert, a judge may structure the *method* of punishment in the way that most effectively protects society from the danger of a future offense (For example, instead of three years in prison, a judge might impose a sentence of equal punitiveness that involves house arrest but with a much longer period of monitoring and control, including an ankle bracelet, a curfew, limitations on personal associations and activities, and other such control measures).

Imposing greater punishment than deserved in order to provide additional incapacitation only assures injustice.[16] And the resulting perception of unjustness of the system undermines its moral credibility and thereby its crime-control effectiveness, in ways that may well outweigh the crime-control gains realized by the deviation. At the very least, I would urge that such deviations from desert for preventive purposes be used sparingly and in ways that minimize the deviation.[17]

As I have argued above and elsewhere,[18] both society and detainees would be better off if, instead of being cloaked as punishment for a past offense, such preventive detention was done openly through a civil commitment system that attracts the scrutiny that such preventive detention merits, including an examination of such questions as: What is the reliability of the prediction of future dangerousness? (Evidence suggests our current predictive accuracy is poor.) What is the rate of false positives in such predictions? What minimum future danger is required to justify what length of preventive detention? How frequently must the continuing dangerousness of the detainee be demonstrated? All of these critical

16 See Robinson, Goodwin & Reisig, supra note 8.

17 It is also suggested in this edition that such deviation, which try to foresee the capacitation of the (future) dangerous, contradicts the Israeli Basic Law: Human Dignity and Liberty. See The Jerusalem Criminal Justice Group, supra note 9.

18 See ROBINSON, DISTRIBUTIVE PRINCIPLES, supra note 5, at ch. 6, § D; Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, supra note 7.

questions are short-circuited when preventive detention is cloaked as criminal justice.

B. Guiding Judicial Discretion through the Articulation of "Starting Points" Adjusted by Mitigating and Aggravating Factors

The Proposal sets a useful middle course in the means by which judicial sentencing discretion is to be guided.[19] It provides a good deal of details toward constructing specific sentences – not just general principles – but does not bind judges to fixed sentences.[20] The proposed scheme retains a good deal of flexibility for the sentencing judge, but does mandate that the judge consider all the factors set out in the guidelines as being relevant to punishment.

This strikes me as a fine compromise, at least for a first set of guidelines. Understandably, Judges will have reservations given the lack of evidence as to the reliability and sophistication of the guidelines they are asked to follow. Over time, if the guidelines earn themselves a reputation of being well thought out and accurate in their assessments, one might consider a path of increased guidance. But to leave the guidelines entirely general and toothless risks conditioning judges to ignore them, and this is not likely to provide a foundation upon which a more reliable and sophisticated set of guidelines can be built.

Key to understanding the need for some, albeit modest intrusion upon judicial sentencing discretion is an appreciation for the root causes of improper sentencing disparity and the serious unfairness it produces. To the extent that different judges come to different factual conclusions about the same case, there is nothing that a sentencing system can do to avoid the problem, other than to give judges greater special education and experience. The real targets of sentencing guidelines are those disparities in the treatment of similar cases that arise from the differences among

19 Ohana, supra note 1, at 630-631, § 11.

20 It would be useful if the Sentencing Guidelines Committee was authorized to expand upon the list of relevant factors and their articulation.

judges' sentencing philosophies, by which I mean the *principles* by which they distribute punishment.

It is quite natural for judges to disagree among themselves about these principles, just as scholars and policymakers do. Different philosophies, of course, will generate different sentences for identical cases. I have described above the growing scholarly consensus in the United States in support of desert as a distributive principle, but clearly there remain many dissenters. It should be no surprise that judges will disagree among themselves about such matters, but it is unconscionable that an offender will have his punishment determined by the sheer chance of the sentencing judge they are assigned.

A society may well have to tolerate the inevitable differences in fact-finding among different judges, but it need not and ought not to tolerate the application of different punishment philosophies to different offenders, and without guidelines to articulate a single set of principles for all judges, the problem of conflicting principles among judges cannot begin to be solved.[21]

D. Sentencing Guideline Drafting Committee[22]

The proposal envisions the creation of a committee to draft the initial set of guidelines, whose members have some expertise in the area and represent a variety of interested constituencies. I think this approach has some significant advantage over leaving the project to normal legislative processes. The guidelines-drafting process requires expertise in criminal law and theory and a level of detail in research and drafting well beyond what reasonably could be expected of legislators. The use of the 'committee approach' is likely to produce not only a better informed set of guidelines but also to somewhat insulate the process from the predictable and oft-

21 Yet, it remains unclear to several Israeli scholars whether the Proposal shall lead to smaller punishment gaps. See The Jerusalem Criminal Justice Group, supra note 9.

22 It is suggested by some that setting sentencing guidelines by a drafting committee might be considered illegal. For this claim See The Jerusalem Criminal Justice Group, supra note 9.

times irrational pressures of crime legislation politics (Indeed, I would further urge that the standing committee be created to serve as a continuing overseer of the guidelines).

My support of the 'committee approach' derives from several decades of working with legislatures both in the United States and overseas in reforming their criminal laws. While I very much believe in the value of the legislative process as a means of expressing the democratic will, anyone involved in it knows that traditional political processes have some important limitations that ought not to be ignored.

First, crime legislation in particular seems to be susceptible to an unhealthy dynamic. Here I may be simply projecting the problems common in the United States, which may or may not exist in Israel. In the U.S. crime legislation process, it is common to hear thoughtful and responsible legislators say they are going to vote for a crime bill that they think is unwise and perhaps even dangerous. They see themselves as having no choice because the failure to vote for the legislation leaves them vulnerable, in the next election, to attacks claiming that the legislator is "soft on crime." It only takes one ambitious legislator looking for a headline to maneuver his colleagues into a bad piece of legislation that no one really wants.

Second, when it comes to crime legislation, the political process often responds ad hoc to some situation or event in the recent headlines.[23] This tendency to focus on the crime-de-jour has serious long-term complications. Because the legislation is passed when people are worked up about the crime at hand, it tends to exaggerate the seriousness of the crime in relation to other offenses. Over time, the improper

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23 A famous example of this is the "Lindbergh Law", which made kidnapping a federal offense in the wake of the taking of Charles Lindbergh's infant son from the famous U.S. aviator's house. *See* M. Todd Scott, Comment, *Kidnapping Federalism: United States v. Wills and the Constitutionality of Extending Federal Criminal Law Into the States*, 93 J. CRIM. L. & CRIMINOLOGY 753 (2003) (describing the kidnapping and subsequent legislation). Another famous criminal law passed immediately after a prominent crime is "Megan's Law", establishing the nation's first modern sex offender registration and notification requirement. See Corey R. Young, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV J. ON LEGIS. 369, 372 (2009) (examining the impetus behind passage of the law).

grading of offenses may become apparent, but there is little political motivation to reduce a penalty. Indeed, the out-of-line penalty only serves to increase the likelihood that the next crime-de-jour will be subject to a penalty that is even more out of line, as its sponsors use the most recent legislation as their point of comparison and want to exceed that point in order to express their serious concern about the new crime. The simple fact is that, when the legislature enacts laws covering individual crimes, it rarely, if ever, stops to realistically assess how the crime at hand properly fits into the larger scheme of existing offenses and their relative penalties.

The legislative tendency toward ill-conceived crime legislation generally and the crime-de-jour problem in particular is probably too strong to be blocked, I fear. However, it is realistic to assume that a standing sentencing guideline committee could compensate for the structural weakness. That is, it could do the careful assessment of the relative seriousness of offenses, including new offenses, and set the "start point" for each according to its relative seriousness. The guidelines must defer to all legislative directions, of course; the committee can only provide guidance within the limits that the legislature has set, and judges will be free to deviate from the guidelines' starting point, of course. However, the guidelines could at least provide a set of "starting points" that sets each offense or sub-offense in proper relation to all other offenses and that instructs judges to take account of the full range of factors that can be relevant to desert.

E. Conclusion

The proposal takes up an important area in which many reformers, in my view, have gotten things seriously wrong. It is a pleasant surprise, then, to see such a thoughtful and reasonable approach to the complex problems of irrationality and unjustifiable disparity in sentencing. The proposal's recognition of desert as the guiding principle for the distribution of punishment, its use of specific yet flexible guidelines for the exercise of judicial discretion, coupled with the creation of a commission to develop and update the guidelines as needed, seems likely to move the criminal justice system toward greater justice and effectiveness.

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